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‘OUT OF SCHOOL EDUCATION’ AND RADICALISATION: HOME EDUCATION REVISITED

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INTRODUCTION

In November 2015 the government launched a consultation about ‘out-of-school education settings’ (‘the Consultation’).¹ This widely publicised² initiative was motivated by concerns raised by OFSTED about the existence of ‘unregistered schools’, their physical conditions, staff not being suitably checked, and the type of education being provided.³ The latter concern was based on inspectors having observed ‘a narrow Islamic-focused curriculum’ and ‘inappropriate books and other texts including misogynistic, homophobic and anti-Semitic material’⁴ and cohered with the government’s own broader ‘prevent’ agenda.⁵ The Consultation proposes that ‘certain out of school education settings be required to register and be subject to risk based inspections’.⁶

In his initial letter to the Secretary of State for Education, which raised OFSTED’S concerns, Sir Michael Wilshaw recommended that the government: ‘review the arrangements for home education to ensure that they cannot be exploited in order to avoid registration’.⁷ However these arrangements are not included in the Consultation, indeed it states that the proposals are:

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¹ *Out-of-school education settings: call for evidence*, DfE, November 2015.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480133/out_of_school_education_settings_call_for_evidence.pdf

² ‘Home-school families face potential investigation over ‘radicalisation risk’, *The Guardian*, 20.12.15; Jeffreys, ‘Illegal unregistered schools face prosecution’, 11 December 2015, BBC, <http://www.bbc.co.uk/news/education-35070984>.

³ See letters from Sir Michael Wilshaw HMCI to The Secretary of State for Education dated 11.12.15 and 10.11.15, available at:
<https://www.gov.uk/government/publications/unregistered-schools-ofsted-advice-note>

⁴ Ibid, letter dated 11.12.15, p 2.

⁵ Counter-Terrorism and Security Act 2015. Pt Five; *The Prevent duty: Departmental advice for schools and childcare providers*, DfE, June 2015, available at:
<https://www.gov.uk/government/publications/protecting-children-from-radicalisation-the-prevent-duty>.

⁶ The Consultation, at p 3.

⁷ Letter dated 11.12.15, op cit, n 3.

‘ . . . not about regulating the education that parents provide their children in their home. The government continues to respect the rights of parents to home educate their children, whether at home or in a combination of other settings, provided a suitable full-time education is being arranged’.⁸

The recognition of the fact that potentially large numbers of children are educated in unregulated settings is long overdue. But in attempting to sustain a distinction between ‘home education’ and ‘out of school education settings’ the proposals – which focus on both the form and content of education – create inconsistencies in the law and, as Wilshaw correctly advised, may result in more children falling under the radar.

The aim here is not to evaluate the underlying premises or the proposals in the Consultation, but, rather, to examine and clarify the relationship between ‘out of school settings’ and home education. In doing so it revisits earlier debates about the regulation of home education and indicates the ways in which the Consultation exacerbates existing anomalies and reinforces the need for government action. In particular it highlights weaknesses and omissions in the Department for Education’s *Elective Home Education: Guidelines for Local Authorities* (‘the Guidance’). Largely unaltered since 2007, the Guidance – which applies only to England⁹ – is in many respects out of date and fails to provide much needed clarity.¹⁰

The article begins by locating ‘out of school settings’ within the broader legal framework about home education and identifies the relevance here of earlier debates about compulsory regulation for home educators. It then examines the monitoring powers and duties of local authorities, indicating

⁸ Ibid, para 2.4.

⁹ While the legislative framework is the same, separate Guidance exists in Wales and is currently subject to review, see:

<http://gov.wales/about/cabinet/cabinetstatements/2015/homeeducation/?lang=en>.

¹⁰ DCSF, available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288135/guidelines_for_las_on_elective_home_educationsecondrevisedv2_0.pdf. The status of government guidance is a complex issue in administrative law. While the Guidance here, unlike others in education law, has no statutory basis, local authorities could still be considered to be acting irrationally, and thus unlawfully, by failing to have regard to it. However this does not mean that they must be followed without question. And where, as is the case here, subsequent legislation has been enacted and case law indicates different interpretations of the key statutory provisions, it is not ‘unreasonable’ for local authorities to have regard to these higher authorities alongside the advice in the Guidance.

areas of confusion and tensions between the Guidance and the limited case law. Turning then to the vexed relationship between ‘safeguarding’ and home education it identifies uncertainties about the existing law, omissions in the Guidance, and demonstrates how the Consultation exacerbates the situation by effectively conflating ‘education’ and ‘welfare’. Exploring this relationship in more detail it examines the existing confusions about the meaning of ‘suitable education’ in the context of home education and highlights how the Consultation opens up this issue to debates about civic education more widely.

LEGAL BACKGROUND

Under the current legal framework parents are required to ensure that their children ‘receive efficient full-time education . . . either by regular attendance at school or otherwise’¹¹. While the expression ‘or otherwise’ refers to a variety of settings, it has long been recognised as providing parents with the option of complying with their duty to educate their children by way of home education; in effect establishing a conditional, as opposed to an absolute, right to home educate.¹² Successive governments have repeatedly made clear that it is this provision that upholds a child’s right to education, in compliance with Article 28 of the United Nations Convention on the Rights of the Child (‘UNCRC’)¹³ and Article 2 of the First Protocol of the European

¹¹ Education Act 1996, s 7.

¹² For further analysis of the ‘right to home educate’, see Monk, ‘Regulating Home Education: Negotiating Standards, Anomalies and Rights’ (2009) *Child and Family Law Quarterly* 21(2): 155-184.

¹³ *The United Nations Convention on the Rights of the Child: How legislation underpins implementation in England*, March 2010, paras 7.1, 7.3, 7.10: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/296368/uncrc_how_legislation_underpins_implementation_in_england_march_2010.pdf. While the UN CRC has not been incorporated into domestic law, and its status in this way differs from that of the ECHR, it is an increasingly important source of law, is cited by judges in domestic case law (see, for example, *R (on the application of Williamson) v Secretary of State for Education and Employment*; UKHL 15 [2005] 2 AC 246) and the government has stated clearly that, ‘All UK government policies and practices must comply with the UNCRC’: *2010 – 2015 government policy: equality, May 2015, Appendix 6*, available at: <https://www.gov.uk/government/publications/2010-to-2015-government-policy-equality/2010-to-2015-government-policy-equality>. In the context of children’s rights it is important to distinguish the right to education from rights in education. With regard to the latter Article 12 of the UNCRC is crucial. But while the right to education is respected, children’s own views are rarely heard and in this respect education law is arguably out of step with child law, see Monk, ‘Children’s rights in education: making sense of contradictions’ (2002) *Child and Family Law Quarterly* 14 (1): 45-56.

Convention on Human Rights ('ECHR'). Consequently, all children of compulsory 'school' age must be 'registered pupils', provided with alternative provision by local authorities or 'electively home educated'.

Children who are 'registered pupils' at both maintained and independent schools are subject to an extensive system of monitoring and regulation. A critical question here is the definition of a 'school'. The threshold for this is low and set out in the legal provisions requiring the registration of independent schools. These state that an independent school is:

' . . . any school at which full-time education is provided for five or more pupils of compulsory school age or only one pupil where a child has an Education and Health Care plan, a statement of special educational needs or who is looked after by the local authority'.¹⁴

'Full-time' is not defined by statute but government advice issued in July 2015 to proprietors of independent schools states that:

'It is unlikely that a school operating for fewer than 18 hours per week will be able to meet the standards and register as an independent school and we anticipate that schools offering teaching of around 20 hours per week or more will be providing full-time education and will therefore need to register'.¹⁵

Where only 'part-time' education is provided such a setting is included, alongside independent schools, within the definition of 'an independent education institution'.¹⁶ The proposals in the Consultation, which seeks 'views on defining a threshold for settings to fall within the scope of this proposal',¹⁷ would require those providing 'intensive education'¹⁸ to register and be subject to inspections, although on a different basis from independent schools.

A child that is, in law, home educated may be educated in a combination of settings: at home and in 'out of school settings', which the

¹⁴ Education Act 1996 s 463 (as amended by the Education Act 2002, s 172).

¹⁵ *Registration of independent schools: Departmental advice for proprietors and prospective proprietors of independent schools in England*, Dfe, July 2015, Pt A, p 5.

¹⁶ Education and Skills Act 2008, s 92(1)(b).

¹⁷ Consultation, paras 3.7-3.9.

¹⁸ The Consultation states that: 'Intensive education could be considered anything which entails an individual child attending a setting for more than between 6 to 8 hours a week, bearing in mind that this could be over an hour every day after school or on one or both days of the weekend', para 3.7.

Consultation notes can ‘support home education’.¹⁹ The concerns raised by OFSTED indicate that in practice some may also spend time at a ‘school’ that is, but should not be, unregistered. The Guidance makes clear that parents who home educate may:

‘ . . . choose to employ other people to educate their child, though they themselves will continue to be responsible for the education provided. They will also be responsible for ensuring that these whom they engage are suitable to have access to children’.²⁰

The Consultation’s proposals would change this position by involving external agencies in the registration and monitoring of some of these contexts, subject to thresholds yet to be determined, and the Guidance would require revising to address this.

Where a child attends a registered school on a part-time basis as part of a ‘flexi-school’ agreement, the child is, in law, a ‘registered pupil’. This is the case even where the majority of the time the child is educated at home or elsewhere.²¹

Addressing OFSTED’s concern about the existence of ‘unregistered schools’ requires no change in the law and is simply a question of compliance. But the task of discovering the existence of schools that should be registered and of part-time ‘out of school settings’, both of which, as the law makes clear, may be very small, is in practice made harder by the fact that there is currently no requirement for parents who elect to home educate to register with local authorities or to provide information about where or how their children are being educated. Without such a requirement it is not only impossible to know how many children are home educated but, in addition, parents who wish – for whatever reason – to avoid the attention of local

¹⁹ Ibid, para 3.2.

²⁰ The Guidance, para 4.8.

²¹ Confusion about this arises because the practice is often understood, and has been described by a government minister, as, ‘a combination of school attendance and home education’ (David Foster, *Home Education*, Standard Note SN/P/5108, 26 February 2015, House of Commons Library). The Guidance was amended in February 2013 in an attempt to prevent flexi-schooling but this was swiftly reversed in March 2013 and its legality confirmed. A further confusion arises because there is no accurate code to record a child’s absence in the attendance records; the revised Guidance in March 2013 (para 5.6) makes clear however that it should be as Code C - ‘authorised absence’ and not Code B – ‘educated off-site’. More widely on this practice see *Flexischooling: Special Edition*, The Journal of Personalised Education Now, Spr/Sum 2012, Issue No.16.

authorities and OFSTED may choose to educate their children either solely at home or in an environment that falls below whatever threshold is set that might trigger a duty to register an out of school setting. As the Consultation itself notes, ‘providers operating below the threshold would not be subject to any inspection’²² – this creates the potential loophole that Sir Michael Wilshaw advised the government to consider.

The question of registration for home educators is controversial and the current law while clear is inconsistent. Where a child has never attended school or where a child is ‘naturally deregistered’ from a school, for example, transferring from nursery to primary or primary to secondary, parents are not required to register or seek approval from the local authority’.²³ But where parents wishing to home educate are removing a child from a maintained school, while the Guidance makes clear that *local authorities* have ‘no legal right to insist’²⁴ that parents inform them of their decision, statutory regulations require that the parents inform *the school* of their decision and the school, not the parent, is then required to inform the local authority.²⁵

In June 2009 a review of home education chaired by Graham Badman (the Badman Review), at the request of Ed Balls, the then Secretary of State for Children, Schools and Families, recommended the introduction of a compulsory national registration scheme.²⁶ This recommendation was subsequently included in Clause 26 of the Children Schools and Families Bill 2009 (the 2009 Bill). The 2009 Bill was considered in detail by the House of Commons Select Committee for Children Schools and Families (the Select Committee), which published a report in December 2009.²⁷ Compulsory registration was widely supported by local authorities and by Sue Berelowitz,

²² The Consultation, para 3.13.

²³ The Guidance, para 2.4.

²⁴ Ibid para 3.10.

²⁵ Education (Pupil Registration) (England) Regulations 2006, SI 2006/1751, regs 8(1)(d), 12(3). The Department for Education recently launched a consultation to amend these Regulations in order to improve systems for identifying children missing education: see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492698/Improving_Information_in_Identifying_Children_Missing_Education__consultation_document_-_final_19_Jan_2016__n4.pdf

²⁶ Graham Badman, *Report to the Secretary of State on the Review of Elective Home Education in England*, HC 610, June 2009, Recommendation 1, p 38.

²⁷ House of Commons Select Committee on Children, Schools and Families *Final Report: The Review of Elective Home Education*, 9 December 2009. See: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmchilsch/39/39i.pdf>

the Deputy Children's Commissioner, who argued that it was 'not acceptable that the state should not be able to vouch for the education of so many of its citizens'.²⁸ The Select Committee concluded that it was 'unacceptable that local authorities do not know accurately how many children of school age in their area are in school, are being home educated or are otherwise not in school', accepted that 'existing databases could not provide an equally efficient and secure means to that end' and that 'a separate registration system for home educating families should be put in place'.²⁹ However the Select Committee recommended that the system of registration should initially be voluntary, subject to a review after two years, after which, 'if it is found not to have met expectations' it recommended that 'a system of compulsory registration would need to be introduced'.³⁰

The 2009 Bill was enacted as part of the 'wash-up' process prior to the general election in 2010. But as a result of the Select Committee's concerns and extensive and highly effective lobbying by home educators, none of the provisions relating to home education were included. While apolitical,³¹ the home education lobby's resistance to registration chimed with predominantly Conservative parliamentarians' concerns about increased surveillance of parents and expanding the role of local authorities, particularly in education.³² The government's continued support of the status quo is evident in the Consultation.

One of the criticisms of a compulsory system of registration was that it would fail to 'solve the problem of "hard cases"'.³³ In other words that parents who wished to avoid the attention of the local authorities, for whatever reason – legitimate or otherwise - would simply not register or indeed possibly send their child abroad. This is a valid concern but one that applies equally to the

²⁸ Ibid para 54. A similar recommendation has recently been made by Wales' Children's Commissioner, see: <http://www.bbc.co.uk/news/uk-wales-south-west-wales-35380182?platform=hootsuite>

²⁹ Ibid para 62.

³⁰ Ibid para 63.

³¹ In marked contrast to the position in the US, see Monk, op cit, n 12 and Apple, 'Education as God Wants It: Gender, Labour and Home Schooling' in P Rothermel (ed) *International Perspectives on Home Education* (Palgrave, 2015).

³² Harris, 'Local Authorities and the Accountability Gap in a Fragmenting Schools System' (2012) *The Modern Law Review*, 75: 511–546.

³³ Select Committee, op cit, n 26, at para 55.

new proposals in the Consultation that would require the registration of providers of some out of school settings.

A critical issue for local authorities – which informed their wide support for registration - is the extent to which it would assist them in complying with their existing legal duties in relation to the monitoring of home-educated children. The crux of the problem here is the lack of clarity in the existing law about what precisely these duties are and the weaknesses in the Guidance. These are both examined in the next section.

MONITORING HOME EDUCATION

The key provision is the requirement under Section 437(1) of the Education Act 1996 that:

‘If it appears to a local education authority that a child of compulsory school age in their area is not receiving suitable education, either by regular attendance at school or otherwise, they shall serve a notice in writing on the parent requiring him to satisfy them within the period specified in the notice that the child is receiving such education’.

This makes clear that it is for local authorities and not parents to determine what is ‘suitable education’. An interpretation accepted by the Select Committee.³⁴ This does not mean that ‘suitable’ can take only one form, indeed it is dependent on the ‘age, ability, aptitude and SEN of the particular child’,³⁵ but a local authority is entitled to and should reach its own view of this, and this may legitimately differ from that of the parents. And of course the courts may be called on to resolve such disputes.

As long ago as 1996 the Advisory Centre for Education argued that ‘LEAS cannot fulfill this duty if they have no information about the education which is being given to a child otherwise than at school,’³⁶ an argument that implicitly supports compulsory registration. However, in relation to this provision, the Guidance advises that ‘local authorities have no statutory duties

³⁴ Ibid para 56.

³⁵ Education Act 1996, s 7(a), (b).

³⁶ ACE Information Sheet, *Home Education*, 1996, at p1.

in relation to monitoring the quality of education on a routine basis'.³⁷ It is not clear what 'routine' means in this context. It could be interpreted, narrowly, to mean that not all children should be monitored or, more widely, to suggest that the monitoring should simply depend on the circumstances of individual children, providing local authorities with discretion about how to proceed. However, the former interpretation is hard to reconcile with subsequent statutory duties about safeguarding, examined in the next section, and with case law discussed below – for both support a more pro-active role for local authorities. And while the duty above refers to what a local authority must be satisfied by before issuing a notice, it does not refer to monitoring prior to that point.

The Guidance advises that prior to issuing a notice local authorities should 'address the situation informally'.³⁸ But the Guidance fails to provide any advice to local authorities about duties in relation to home-educated children in their area not known to them. Similarly it provides no advice about their duties towards children where parents refuse to respond adequately, or at all, to their 'informal' enquiries and where, consequently, they do not have enough information to be able to determine if the education provided is 'sufficient'. These omissions create uncertainties for local authorities and as a result practice varies considerably.

The underlying problem here is the statutory expression 'if it appears'. A key case here is *Philips v Brown*.³⁹ In this case parents challenged the issuing of a school attendance notice on the grounds that nothing had been done for it 'to appear' to the local authority that suitable education was not being provided and that, consequently, the local authority was neither bound nor entitled to make enquiries of the parents. Finding against the parents, Donaldson J held that:

'where an authority has a duty to take action in particular circumstances, it also has a duty to be alert in order to detect the possibility that those circumstances exist. . . I do not accept that it

³⁷ Guidance, para 2.7. That the statutory provision is open to different interpretations is clear from the fact that an earlier draft guidance from the DfES advised that local authorities 'must satisfy themselves that the child is being properly educated', para 2, copy with the author.

³⁸ Guidance, para 2.8.

³⁹ Unreported transcript 424/78 QB (DC), 20 June 1980.

should do nothing. This would rightly be criticised as an attempt to behave like an ostrich – to put its head in the sand in order that it should not learn of anything which might place upon it the burden of discharging its duty to consider making and, in appropriate cases, to make school attendance orders. The most obvious step is to ask the parents for information. Of course such a request is not the same as a notice . . . and the parents will be under no duty to comply. However, it would be sensible for them to do so. If parents give no information or adopt the course of merely stating that they are discharging their duty without giving any details of how they are doing so, the LEA will consider and decide whether it ‘appears’ to it that the parents are in breach of section 36 . . . if the parents refuse to answer it could very easily conclude that prima facie the parents were in breach of their duty . . .’

This case is cited in the Guidance a number of times⁴⁰ to support the position that while local authorities may request information and meetings, parents are under ‘no duty to comply’ but ‘it would be sensible for them to do so.’ This advice accurately reflects the judgment in the case. But confusion arises because the judgment read as a whole clearly suggests that a more pro-active role by local authorities is either required by, or, at the very least, is compatible with their statutory duty under section 437(1) above. The present selective quoting from the case consequently creates, at best, confusion. For it is hard to reconcile Donaldson J’s interpretation that: ‘if the parents refuse to answer it could very easily conclude that prima facie the parents were in breach of their duty . . .’, with the subsequent advice in the Guidance that, ‘Where a parent elects not to allow access to their home or their child, this does not of itself constitute a ground for concern about the education provision being made’.⁴¹ The problem is compounded by the Guidance’s failure to refer to other cases, which also support a pro-active role for local authorities.

⁴⁰ Guidance, paras 2.8, 3.4 and 3.6.

⁴¹ Ibid, para 3.6.

The case of *H v UK*,⁴² decided before the enactment of the Human Rights Act 1998, helps clarify the impact of the ECHR.⁴³ The following quote from the judgment indicates that while requiring parents to cooperate is not clear in domestic law, Article 2 of Protocol 1 and Article 8 of the ECHR cannot be used as a reason for non-cooperation:

‘requiring the applicant to cooperate in the assessment of children’s educational standards . . . can not be said to constitute a lack of respect for the applicants rights.’

The case reinforces the well-established position that convictions of parents must not conflict with the fundamental right of a child to education as a whole.⁴⁴

More recently in 2012 in *R (SD and PD) v Essex County Council*⁴⁵ parents challenged the decision of a local authority’s Home Education Service to make a referral to the local authority’s Education Welfare Service. The referral had been made on the basis of the parents’ failure to cooperate with requests for information about their child’s education. The case was categorically rejected, application for permission to apply for judicial review was refused and the decision was upheld on appeal. This decision is important in emphasising the monitoring powers of local authorities for in this case it was later established that the home education the child was receiving was ‘suitable’.

The issue of home education can also arise in the context of child protection and private family law proceedings.⁴⁶ A recent example of the former is *Re S (a child with disabilities)*.⁴⁷ While not critical of home education per se the case highlighted how concerns about health and development could not always be separated from education as Roberts J noted: ‘one of the unintended consequences of the provision of home education for children with

⁴² *Application No 10233/83 DR at 105.*

⁴³ Article 2 of Protocol 1 of the ECHR is referred to at para 2.2.

⁴⁴ *Campbell and Cosans v UK* (1982) 4 EHRR 293.

⁴⁵ CO/6935/2012.

⁴⁶ For an example of a private law dispute between parents (where the father’s objection to the mother’s preference for home education was supported by the court) see *Re M (Children)* [2012] EWCA Civ 1218. The reliance on the ‘best interests’ test here is notably different to the threshold test in care proceedings; see, for example, *Re M (A Child)* [2014] Lexis Citation 256 where Judge Owens held that while home education for the child in question might ‘not be ideal’ it was ‘good enough’.

⁴⁷ [2015] EWFC B40; Case No CM1HC05231.

complex medical needs is the potential that this creates for disengagement with health services, both universal and specialist service'.⁴⁸ Supporting not only the power of a local authority to monitor pro-actively but also their duty to do so, the judge raised questions about the adequacy of the monitoring of the child's education finding that, 'As for the annual review by the Education Service, I do not think it is worth the paper it is written on'.⁴⁹ And raising a more general concern she noted that:

'I question whether the right of parents to opt for home education is compatible with the rights of their children in many cases, not just this one, and if this right is to continue, surely the State must do much more to establish that the child is being educated according to his or her needs and that the child is not otherwise neglected or having his or her needs met'.⁵⁰

This comment is clearly *obiter* but it adds further credence to the judicial interpretations of the law that - in contrast to the Guidance - support local authorities taking a pro-active role in monitoring home education.

The case also raises questions about the complex interface between home education and 'safeguarding' more widely; an issue that touches not only on child protection but, as the proposals in the Consultation make clear, impacts directly on determining the meaning of 'suitable' education. These issues are examined in the next sections.

'SAFEGUARDING'

Home education per se is not a safeguarding issue; a home-educated child is no more in any way potentially 'at risk' than a 'registered pupil'. To suggest otherwise arguably demonstrates a failure to respect home education as a legitimate form of education.⁵¹ The Select Committee criticised the Badman Review proposals and subsequent provisions in the 2009 Bill, which would have added a safeguarding role to local authority duties in relation to home-educated children, for 'their conflation of education and safeguarding

⁴⁸ Ibid para 60.

⁴⁹ Ibid para 62.

⁵⁰ Ibid para 62.

⁵¹ See F Allen, 'Out of school, out of sight', 4 November, 2011, No 4966, *Times Education Supplement*, pp28-32.

matters'.⁵² Noting the existing and extensive statutory provisions relating to safeguarding, the Select Committee emphasised that the correct approach for home education services was to refer concerns about safeguarding to social services; mirroring the approach adopted by schools as a key referral agency.⁵³

However the Select Committee recognised the potential tension between the safeguarding legislation and the Guidance's 'emphasis on the limited applicability of these statutes to home education', acknowledged that 'this in itself renders home education something of an anomaly' and recommended both statutory clarification and clearer guidance on the matter.⁵⁴ The Guidance undoubtedly requires revising to clarify the existing legislation, in particular the provisions relating to 'children missing education' and 'child welfare' more widely, for the reasons set out below.

Children missing education

Section 436A of the Education Act 1996 states that:

- (1) A local education authority must make arrangements to enable them to establish (so far as it is possible to do so) the identities of children in their area who are of compulsory school age but-
 - (a) are not registered pupils at a school, and
 - (b) *are not receiving suitable education otherwise than at a school.*

With regard to this provision the Guidance states that, 'The guidance issued makes it clear that the duty does not apply to children who are being educated at home'.⁵⁵ The cross reference here is to separate guidance relating to children missing education. However this guidance was revised in 2013 and the new guidance issued made explicit that the provision *does* relate to home education and indeed there is nothing in the statutory provision to suggest otherwise. This guidance was revised again in January 2015⁵⁶ and while not as explicit the current guidance also makes clear that the provision potentially relates to children whose parents have elected to home educate. It states that

⁵² Select Committee, p 4.

⁵³ Ibid para 71.

⁵⁴ Ibid para 73.

⁵⁵ Guidance, para 2.6.

⁵⁶ *Children missing Education, statutory guidelines for local authorities*, DfE, January 2015.

‘The LA should consult the parents of the child when establishing whether the child is receiving suitable education’ and that it ‘relates to children of compulsory school age’.⁵⁷ It also advises that School Attendance proceedings can be used ‘to satisfy the LA that the child is receiving suitable education when it comes to the local authority’s attention that a child might not be receiving such education’.⁵⁸ The latter reference to ‘when it comes’ clearly mirrors the statutory reference to ‘if it appears’ discussed above, although it arguably takes a more restrictive approach. This is unhelpful, as the case law above makes clear that the provision is not incompatible with a pro-active and investigatory role. A ‘home-educated child’ is not a ‘child missing education’. But where a child is home educated and the education is not sufficient then it clearly is. This provision clearly identifies a positive role for local authorities here, and it needs to be clarified by the Guidance.

Child welfare

Section 175 of the Education Act 2002 requires that:

‘A local education authority shall make arrangements for ensuring that the functions conferred on them in their capacity as a local education authority are exercised with a view to safeguarding and promoting the welfare of children.’

Local authority functions here are explicitly defined as including ‘the provision of education for children of compulsory school age *otherwise than at a school*’ – it clearly therefore applies to home education. The Guidance acknowledges this and advises that the provision:

‘does not extend local authorities’ functions. It does not for example give local authorities powers to enter the homes or otherwise see children for the purposes of monitoring the provision of elective home education’.⁵⁹

The Guidance, unhelpfully, provides no positive advice to local authorities about this provision. One way in which it could do so would be by referring to the recent case of *R (SD and PD) v Essex County Council*, noted above. For

⁵⁷ Ibid p4.

⁵⁸ Ibid p 6.

⁵⁹ Guidance, para 2.12.

it made clear that a parental refusal to answer questions *about the provision of education* was itself a legitimate ground for making a referral to social services.

‘SAFEGUARDING’ AND ‘RADICALISATION’

The Select Committee’s recognition of the potential tension between the safeguarding legislation and home education has been made more acute by the government’s locating of concerns about the ‘risk of radicalisation’⁶⁰ within the safeguarding agenda.

The Consultation states clearly that ‘failing to safeguard and promote the welfare of children . . . includes failing to protect them from the harm caused by extremism’.⁶¹ And in guidance to schools about the ‘prevent’ duty, the government goes as far as to suggest that the risk of radicalisation:

‘is similar in nature to protecting children from other harms (e.g. drugs, gangs, neglect, sexual exploitation). Whether these come from within their family or are the product of outside influence’.⁶²

While the Consultation has excluded reviewing the arrangements relating to home education from its remit, the new statutory ‘prevent’ duties relating to ‘radicalisation’ do apply to local authorities’ functions relating to home education.

Section 26(1) of The Counter-Terrorism and Security Act 2015 requires local authorities⁶³ in the exercise of their functions to ‘have due regard to the need to prevent people from being drawn into terrorism’. And section 36 requires them to ensure ‘that a panel of persons is in place for its area ‘with the function of assessing the extent to which identified individuals are vulnerable to being drawn into terrorism’.

The general guidance about the ‘prevent’ duty advises that it ‘does not confer new functions on any specified authority’ and that ‘due regard’ means

⁶⁰ ‘Radicalisation’ refers to the process by which a person comes to support terrorism and forms of extremism leading to terrorism. During the that process it is possible to intervene to prevent vulnerable people being drawn into terrorist-related activity’ The Prevent duty: Departmental advice for schools and childcare providers, June 2015, p4.

⁶¹ Consultation, para 1.1.

⁶² *The Prevent duty: Departmental advice for schools and childcare providers*, June 2015, p 5. For a critique of this conflation, see Stanley and Guru, ‘Childhood radicalisation risk: An emerging practice issue’ (2015) *Practice* 27(5): 353-366

⁶³ All LAs are ‘specified authorities’: The Counter-Terrorism and Security Act 2015, Sch 6.

that authorities 'should place an appropriate amount of weight on the need to prevent people being drawn into terrorism when they consider all the other factors relevant to how they carry out their usual functions'.⁶⁴

The 'prevent' duty clearly includes local authority functions relating to home education. But while detailed advice about the implications of this duty has been provided to schools and childminders,⁶⁵ home education is not referred to. Home education is however referred to in the general guidance about the duty in the context of 'out of school settings supporting children'.⁶⁶

Putting aside the complex questions of legitimacy and effectiveness raised by the 'prevent' agenda more generally, and they are not unsubstantial,⁶⁷ it is suggested that the removal of home education by parents from the remit of the Consultation is problematic; all the more so as the general 'prevent' guidance, as noted above, makes clear that the risk of radicalisation can come 'from within the family'.⁶⁸ At the very least the Guidance about home education requires revising to clarify the position and especially in light of Sir Michael Wilshaw's concern about the potential loophole that home education provides for those who wish to avoid any attention.

One way in which it might, in theory, be possible to reconcile the Consultation's avoidance of the issue of home education with the government's identification of risk of radicalisation as a safeguarding issue,

⁶⁴ *Revised Prevent Duty Guidance: for England and Wales: Guidance for specified authorities in England and Wales on the duty in the Counter-Terrorism and Security Act 2015 to have due regard to the need to prevent people from being drawn into terrorism*, 16 July 2015, para 4.

⁶⁵ *The Prevent duty: Departmental advice for schools and childcare providers*, June 2015

⁶⁶ *Revised Prevent Duty Guidance: for England and Wales: Guidance for specified authorities in England and Wales on the duty in the Counter-Terrorism and Security Act 2015 to have due regard to the need to prevent people from being drawn into terrorism*, 16 July 2015. Para 51.

⁶⁷ See, Heath- Kelly, 'Counter- Terrorism and the Counterfactual: Producing the 'Radicalisation' Discourse and the UK PREVENT Strategy' (2013) *The British Journal of Politics & International Relations* 15(3): 394-415; McDonald, 'Securing identities, resisting terror: Muslim youth work in the UK and its implications for security' (2011) *Religion, State and Society* 39(2-3): 177-189; Quartermaine, 'Discussing terrorism: a pupil-inspired guide to UK counter-terrorism policy implementation in religious education classrooms in England' (2014) *British journal of religious education* 1-17; Coppock and McGovern, 'Dangerous Minds'? Deconstructing Counter-Terrorism Discourse, Radicalisation and the 'Psychological Vulnerability' of Muslim Children and Young People in Britain (2014) *Children & Society*, 28: 242-256; Stanley and Guru., op cit, n 61.

⁶⁸ *The Prevent duty: Departmental advice for schools and childcare providers*, June 2015, p 5.

would be to suggest that the risk is anomalous to the parental right to use corporal punishment. In other words, a harm to be prevented if carried out by anyone *other* than a parent. Indeed while the Consultation proposes ‘to ensure that corporal punishment is not a practice adopted in out-of-school settings’,⁶⁹ children’s rights campaigns to outlaw *parental* chastisement have consistently met with government resistance.⁷⁰ However the analogy is inconsistent with emerging, albeit controversial, developments in the field of child protection. For unlike lawful parental chastisement, harm resulting from radicalisation has been accepted as a legitimate ground for the non-consensual separating of young people from their family.⁷¹ There are questions of degree here, but if the draconian step of removing children from their parents is in certain circumstances legitimate on the basis of the risk of radicalisation, it is difficult to understand why monitoring home education is not.

‘SUFFICIENT EDUCATION’ AND ‘RADICALISATION’

While the Consultation conflates ‘welfare’ with ‘radicalisation’, by locating the latter within the safeguarding agenda, it consequently indicates that the content of education itself is now considered an aspect of safeguarding. This is clear from the Consultation as it is informed by the belief that:

‘ . . . it is right to expect children to be in a safe environment and somewhere which does not teach children views which undermine our fundamental British values of democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs’.⁷²

This brings to the fore two issues; the existing arrangements about the content of home education more widely and the specific impact of the concerns about radicalisation and the place of civic education within the legal

⁶⁹ Consultation, para 3.19.

⁷⁰ Indeed in the case of *Williamson* (op cit, n 13) one of the arguments made on behalf of the government in defence of the ban on physical chastisement in all schools was that home education was an option for parents that objected: Lord Nicholls of Birkenhead at [40].

⁷¹ See, Martin Downs, ‘Is preventing violent extremism a facet of child protection?’ October [2015] Fam Law 1167-1168; Martin Downs and Susan Edwards, ‘Brides and martyrs: protecting children from violent extremism’, September [2015] Fam Law 1073.

⁷² Consultation, para 2.5.

definition of 'suitable education'. Both issues are explored below.

Regulating the content of home education

Where a child is a 'registered pupil', the content of education, at maintained schools, is effectively prescribed by the National Curriculum; and while it does not apply to independent schools, increased regulation of that sector extends to imposing compliance with detailed curriculum requirements.⁷³ None of these statutory provisions apply to a child who is home educated and as the Select Committee noted:

'Home educators prize the flexibility that they have to shape provision to their child's needs and to follow their child's motivations, as opposed to fitting around external frameworks or working through a set plan'.⁷⁴

The Guidance advises that 'it is important to recognise that there are many, equally valid, approaches to educational provision'⁷⁵ and emphasises the freedom that parents who home educate have by advising that:

'Home educating parents are *not* required to: teach the national curriculum; provide a broad and balanced education; have a timetable; have premises equipped to any particular standard; set hours during which education will take place; have any specific qualifications; make detailed plans in advance; observe school hours, days or terms; give formal lessons, mark work done by their child; formally assess progress or set development objectives; reproduce school type per group socialization⁷⁶, match school, age-specific standards'.⁷⁷

The Guidance is much less clear about what *should* be required, advising that:

'local authorities may reasonably expect the provision to include the following: consistent involvement or other significant carers – it is expected that parents or significant carers would play a substantial role

⁷³ Education and Skills Act 2008 s 94(1); The Education (Independent School Standards) Regulations 2014, SI 2014/3283; *Improving the spiritual, moral, social and cultural (SMSC) development of pupils: supplementary information, Departmental advice for independent schools, academies and free schools*, DfE, November 2014.

⁷⁴ Select Committee, para 36.

⁷⁵ Guidance, para 3.14.

⁷⁶ For a critique of negative assumptions about home education and socialisation see Monk, 'Problematising Home Education: Challenging 'Parental Rights' and Socialisation' (2004) *Legal Studies* 24 (4): 568-598.

⁷⁷ Guidance, para 3.13.

although not necessarily constantly or actively involved in providing education; recognition of the child's needs, attitudes and aspirations; opportunities for the child to be stimulated by their learning experiences; access to resources/material required to provide home education for the child – such as paper and pens, books and libraries, arts and crafts materials, physical activity, ICT and the opportunity for appropriate interaction with other children and adults.⁷⁸

Furthermore, the Guidance currently provides no advice about the implications on home education of Section 13A of the Education Act 1996. This provision requires that:

- (1) A local education authority shall ensure that their functions relating to the provision of education . . . are . . . exercised by the authority with a view to-
- promoting high standards,
 - . . . ensuring fair access to educational opportunity, and
 - promoting the fulfilment by every child concerned of his educational potential.⁷⁹

The provision applies to 'children of compulsory school age (whether at school *or otherwise*)',⁸⁰ which makes clear that it applies to home-educated children. The duty does not refer simply to education provided *by* local authorities but to *their functions relating to* the provision of education and the government clarified this in 2010 by stating that the duty refers to '*all* children of compulsory school age'.⁸¹

The Badman Review recommended that home education families should be required to submit a statement of their educational approach. This was supported in principle by the Select Committee which also called for a 'more precise definition of what constitutes "suitable" education', which would 'encompass a positive expectation in relation to, at least, the acquisition of

⁷⁸ Guidance, para 3.15.

⁷⁹ Education Act 1996, s 13A (as inserted in 2006 and subsequently substituted by the Apprenticeships, Skills, Children and Learning Act 2009, Sch 2, para 3).

⁸⁰ Education Act 1996, s 13A(2)(a).

⁸¹ *The United Nations Convention on the Rights of the Child: How legislation underpins implementation in England*, para 7.3, emphasis added, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/296368/uncrc_how_legislation_underpins_implementation_in_england_march_2010.pdf

basic skills’.⁸²

Both the requirement of such a statement and the light touch requirement of basic skills are welcome suggestions. The latter, not only because it emphasises a positive requirement, but also because literacy is a means of learning about the wider world. It is in this way a key aspect of civic education.

Civic education and ‘suitable education’

In light of the Consultation’s concerns about ‘extremism’, the extent to which the definition of ‘suitable education’ addresses civic education requires clarification. As noted above the Guidance advises that home education, in contrast to schools, does *not* need to ‘provide a broad and balanced education’. But it also refers to *the case of R v Secretary of State for Education and Science ex p Talmud Torah Machzikei Hadass School Trust*⁸³ and quotes Woolf J’s finding that an education is ‘suitable’ if it:

‘ . . . primarily equips a child for life within the community of which he is a member, rather than the way of life in the country as a whole, as long as it does not foreclose the child’s options in later years to adopt some other form of life if he wishes to do so’.

This case concerned the adequacy of the curriculum of an independent orthodox Jewish school.⁸⁴ It is particularly pertinent here because of OFSTED’s concerns about the provision in unregistered schools of ‘a narrow Islamic-focused curriculum’⁸⁵ and the Consultation’s emphasis on the importance of ‘individual liberty and the mutual respect and tolerance of different faiths and beliefs’.⁸⁶ Woolf J’s interpretation, arguably far less prescriptive than the ‘prevent’ agenda, suggests that a child, at a minimum, requires basic literacy skills to be able to learn about other lifestyles. But it could also be interpreted to mean that a child needs, at least in some way, to be aware of the existence of other lifestyles and values.

⁸² Select Committee, paras 146, 147.

⁸³ [1985] *The Times*, 12 April.

⁸⁴ For a wider analysis see A Bradney, ‘The inspection of ultra-orthodox Jewish schools: ‘the Audit Society’ and ‘the Society of scholars’ (2009) *Child and Family Law Quarterly* 21(2): 133-154.

⁸⁵ Wilshaw, *op cit*, n 3.

⁸⁶ Consultation, para 2.5.

Balancing parental, community and children's independent rights is a complex exercise. And especially in the highly politicised context of education.⁸⁷ Article 29 of the UNCRC is critical here as it states that the education of the child shall be directed to: 'The development of respect for human rights and fundamental freedoms . . .',⁸⁸ 'the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin',⁸⁹ and respect 'for civilizations different from his or her own'.⁹⁰ These provisions are complemented by the requirement that education must also be directed to, 'the development of respect for the child's parents, his or her own cultural identity, and values, for the national values of the country in which the child is living, the country from which he or she may originate . . .',⁹¹ and by the requirement that subject to conforming to the above, the requirements should not, 'interfere with the liberty of individuals and bodies to establish and direct educational institutions'.⁹² As Harris notes, however, in the context of faith schools, 'the legal and rights frameworks have yet to provide an entirely coherent means of resolving such conflicts'.⁹³

The Consultation states that, 'extremism'⁹⁴ poses a serious and unprecedented threat to our country'.⁹⁵ In doing so it makes clear that prescribing the content of 'suitable education' protects not just the child's right to education but has wider social and political motivations. There is nothing new here; education has never been provided solely on the basis that it is in 'the best interests of the child', and their own views are largely ignored.⁹⁶ In the context of home education the legitimacy of wider motivations was upheld

⁸⁷ See Harris, *Education, Law and Diversity* (Hart, 2006).

⁸⁸ Article 29(1)(b).

⁸⁹ Ibid art 29(1)(d).

⁹⁰ Ibid art 29(1)(c).

⁹¹ Ibid.

⁹² Ibid art 29(2).

⁹³ Harris, at 460 above,

⁹⁴ This is defined as 'the vocal or active opposition to our fundamental values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs. We also regard calls for the death of members of our armed forces as extremist.' Consultation Fn 6 p13.

⁹⁵ Ibid para 2.1.

⁹⁶ See Finch, *Education as Social Policy* (Longman, 1984). Consequently compliance with Articles 3 and 12 of the UNCRC in the context of education is highly debatable. See Monk (2002) op cit, n 13.

by the European Court of Human Rights in the case of *Konrad and Others v Germany*.⁹⁷ Reconciling a ban on home education with the parents' privacy rights under Article 8, the court held that the German Constitutional Court's emphasis on the 'general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society' was 'necessary in a democratic society and in the public interest of securing the education of the child'.⁹⁸

The debate here goes to the heart of political and philosophical debates about the inherent tensions within liberal democracy. In the specific context of home education the educational political theorist Rob Reich has argued that enabling children to be 'minimally autonomous' protects them from ethical servility and, as such, is both in the public interest and a right of the child.⁹⁹ This constructive argument can be used to support the call for ensuring that all home educated children have, at the very least, basic literacy skills. But, commenting more widely, the political theorist Paul Hirst notes how 'embattled defenders of liberalism often thicken the doctrine to the point where it becomes prescriptive and exclusive rather than neutral and procedural'.¹⁰⁰ Similarly Wendy Brown asks: 'what kinds of attachments to unfreedom can be discerned in contemporary political formulations ostensibly concerned with emancipation?'¹⁰¹ These warnings lend support to regulation of a light touch nature, especially in the context of home education, for the existence of the option is often cited in order to legitimise intervention in education by the state elsewhere.¹⁰²

The Consultation explicitly recognises that intervention in 'out of school settings' requires a difficult balancing exercise. It emphasises that it aims to

⁹⁷ (2006) ECHR Application No 35503/03.

⁹⁸ Ibid, p 8. The decision of the court and the German ban have both been subject to extensive criticism: see Monk (2009) op cit, n 12; J Sperling, 'Home Education and the European Convention on Human Rights' and T Spiegler, 'Home Education versus Compulsory Schooling in Germany' both in P Rothermel (2015) op cit, n 30. However, while the domestic laws of Germany and England differ widely, and the 'margin of appreciation' is critical, the jurisprudence of the ECHR relating to other countries is, in this context as in all others, a legitimate source of law for aiding interpretations of the rights under the ECHR.

⁹⁹ Reich, *Bridging Liberalism and Multiculturalism in American Education* (Chicago UP, 2002), p 32.

¹⁰⁰ P Hirst 'J.N.Figgis, Churches and the State' (2002) *The Political Quarterly* 104-120, p117.

¹⁰¹ W Brown, *States of injury: Power and Freedom in Late Modernity* (Princeton, 1995) p71.

¹⁰² See for example, *Kjeldsen and Others v Denmark* (1976) 1 EHRR 711; *Mozart v Hawkins Conty Board of Education* 827 F.2d 1058 (1987) discussed in Monk (2009) op cit, n 12.

be 'proportionate' in its approach,¹⁰³ intends to avoid 'imposing unnecessary burdens'¹⁰⁴ and that 'the registration requirement would be light-touch'.¹⁰⁵ It also makes clear that the proposals 'are not about regulating religion or infringing people's freedom to follow a particular faith or hold particular beliefs'.¹⁰⁶

However in the context of 'extremism', in its attempt to appear to limit the remit of the proposals it arguably contradicts itself. In making risk based inspections it states that OFSTED would not 'be tasked with looking at the *suitability of education*'.¹⁰⁷ But it subsequently states that one of the 'prohibited activities' that are to be specifically targeted by inspections is:

'Undesirable teaching, for example teaching which undermines or is incompatible with fundamental British values, or which promotes extremist views'.¹⁰⁸

It is hard not to see this focus as anything other than a clear attempt by the government to delineate the definition of a 'suitable education'.

CONCLUSIONS

Since the dropping of the provisions about home education in the 2009 Bill there has been a studied governmental reluctance to revisit the issue. The Consultation's explicit rejection of Sir Michael Wilshaw's recommendation to review the arrangements relating to home education is further evidence of this reluctance. The government's commitment to respecting the right of parents to home educate is a welcome recognition of an important political and civil liberty, all the more so in an age of increasing surveillance.¹⁰⁹ But the Consultation's willingness to adopt invasive and compulsory policies in the context of 'radicalisation' demonstrates the contingency of privacy claims and a practice of ad hoc politicised policy making. The Consultation brings to the fore the consequences of a lack of joined up policy making; it creates an

¹⁰³ Consultation, paras 3.6, 3.18.

¹⁰⁴ Ibid, para 1.1.

¹⁰⁵ Ibid, para 3.13.

¹⁰⁶ Ibid, para 2.4.

¹⁰⁷ Ibid, para 3.16 (emphasis added).

¹⁰⁸ Ibid, para 3.19.

¹⁰⁹ Parton, 'Reflections on 'governing the family': the close relationship between child protection and social work in advanced Western societies – the example of England' (2012) *Families, Relationships and Societies* 1 (1): 87-101.

effective loophole to the proposals and by conflating the distinction between ‘safeguarding’ and ‘education’ it highlights and exacerbates the long-standing inconsistencies and confusions about the regulation of home education.

There is a widely acknowledged need for statutory clarification of the role of local authorities in this area. However many of the current uncertainties could be resolved by simply revising the Guidance. Where there is the political will Guidance can be revised quickly, as the two changes in 2013 about flexi-schooling demonstrated.¹¹⁰

If the proposals in the Consultation are enacted they will introduce an enhanced form of monitoring of some home-educated children who are partly educated in ‘out of school settings’. Wherever the threshold is set the Guidance will need to address this. Notwithstanding this the Guidance needs to provide advice to local authorities about the impact of Section 26 of the Counter Terrorism and Security Act 2015 and to clarify their duties arising under Sections 13A and 436A of the Education Act 1996 and Section 175 of the Education Act 2002. With regard to the key duty in Section 436 of the Education Act 1996 the advice in the Guidance needs to acknowledge the broader interpretation provided in *Phillips v Brown* and the clear message from *R (SD and PD) v Essex County Council*. The Guidance is right to emphasise the benefits of informal communication. But it needs to provide advice about situations where, for whatever reason, this is not possible. Addressing these issues by reference to the general statutory duties and to the case law will reassure local authorities that where, in exercising their discretion, they opt to take a more pro-active role, such actions are lawful.

It is important to emphasise that addressing the above issues would simply clarify the existing powers and duties of local authorities. It would not extend them in any way. Introducing a system of compulsory registration, on the other hand, would require statutory reform. While rejected in 2009 and, as with all compulsory schemes, raising inevitable enforcement issues, the absence of such a requirement implicitly legitimises the present situation whereby local authorities have no knowledge of home-educated children in their area. Such a position is in principle hard to reconcile with the legitimate

¹¹⁰ Op cit, n 20.

role of the state in actively protecting a child's right to education. Having, unintentionally, placed home education back on the agenda it is time for the government to dust off and revisit the proposals in the 2009 Bill.